IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

PATRICIA CRUZ,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

TMC HEALTHCARE,
Respondent Employer,

CORVEL CORPORATION,
Respondent Insurer.

No. 2 CA-IC 2013-0010
Filed May 27, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Special Action – Industrial Commission
ICA Claim No. 20112270413
Insurer No. TH11010046
Jacqueline Wohl, Administrative Law Judge

AFFIRMED

COUNSEL

Tretschok, McNamara & Miller, P.C., Tucson
By J. Patrick Butler
Counsel for Petitioner Employee

The Industrial Commission of Arizona, Phoenix
By Andrew F. Wade
Counsel for Respondent

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By Jo Fox Zingg
Counsel for Respondents Employer and Insurer

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Howard concurred.

M I L L E R, Judge:

¶1 In this statutory special action, petitioner Patricia Cruz challenges the administrative law judge's (ALJ) order because the order was not a permanent, unscheduled award. Through an interlocking series of arguments, Cruz contends the ALJ erred by failing to consider (1) the effect of her multiple sclerosis (MS) on her knee injury, (2) the alleged failure of several doctors to consider her MS, and (3) the medical sequelae arising from the decision of her employer to terminate her employment after she was video-taped working at a swap meet while on disability leave. For the following reasons, we affirm.

Factual and Procedural Background

¶2 On review, we consider the evidence in the light most favorable to upholding the ALJ's findings and award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). In May 2011, Cruz was working as a patient care technician at

Tucson Medical Center (TMC) when she slipped and fractured her right kneecap. TMC's workers' compensation insurance carrier, CorVel Corporation (CorVel) accepted Cruz's claim in August and provided temporary compensation. On October 3, 2011, Cruz's treating physician, Dr. Murray Robertson, released her to full activity and discharged her from his care with a "small permanent partial disability." The following month, Dr. Dennis Thrasher, an occupational medicine specialist, conducted an independent medical examination (IME) and concluded Cruz had an eight percent permanent impairment to her knee. He recommended pain medication, physical therapy visits, and yearly imaging of her knee. CorVel issued a notice of claim status closing the workers' compensation claim with an effective date of November 3, 2011.

¶3 Cruz protested the closure of her claim in February 2012, and three formal hearings were held. The ALJ awarded scheduled permanent partial disability compensation of fifty percent of her average monthly wage for four months and supportive medical care. Cruz filed a request for review, and the ALJ affirmed the award on May 14, 2013. Cruz filed this petition for special action on June 11, 2013.

Scheduled Injury

¶4 Cruz first argues the ALJ erred in concluding she had a scheduled[1] permanent partial injury. She contends that her MS condition required the ALJ to find that the knee injury was

[1]A scheduled industrial injury means, in relevant part, that "disability is presumed to result and compensation for the prescribed period of time at 55% of the average monthly wage must be paid." *Alsbrooks v. Indus. Comm'n*, 118 Ariz. 480, 481, 578 P.2d 159, 160 (1978). Partial loss of use of a body part reduces the percentage of the average monthly wage to fifty percent. A.R.S. § 23-1044(B)(21). In contrast, compensation for an unscheduled injury is based on the extent to which the employee suffers a loss of earning capacity after the industrial injury. *Alsbrooks*, 118 Ariz. at 482, 578 P.2d at 161.

unscheduled pursuant to A.R.S. § 23-1044(E).[2] We defer to the ALJ's findings of fact, but independently review questions of law. *See Lane v. Indus. Comm'n*, 218 Ariz. 44, ¶ 9, 178 P.3d 516, 519 (App. 2008). An Industrial Commission award "will be affirmed if it can be supported by any reasonable theory of evidence." *Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46, 749 P.2d 1364, 1367 (1988).

¶5 Section 23–1044(E), A.R.S., determines if a scheduled injury will be unscheduled as the result of a prior disability:

> In case there is a previous disability, as the loss of one eye, one hand, one foot or otherwise, the percentage of disability for a subsequent injury shall be determined by computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury.

To avoid the possibility that any non-industrial physical impairment would convert most scheduled injuries into unscheduled awards, our supreme court concluded this statute requires a showing that the previous nonindustrial impairment affected earning capacity. *Alsbrooks v. Indus. Comm'n*, 118 Ariz. 480, 483, 578 P.2d 159, 162 (1978) (must be "some evidence, no matter how slight" non-industrial impairment diminished earning capacity). Further, a claimant is not entitled to any presumption of disability if the prior disability was neither work related nor within the schedule. *See*

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[2]Cruz also argues that the claim was closed in error because she "was not stable and stationary if her underlying MS condition was taken into consideration." This argument was not raised in her request for review before the ALJ, and Cruz cites to no authority in support of a closure argument; accordingly, we consider it waived. *Brown v. Indus. Comm'n*, 168 Ariz. 287, 288, 812 P.2d 1105, 1106 (App. 1991) ("[W]e will not review an issue which has not been raised in a request for review."); *see also* Ariz. R. Civ. App. P. 13(a)(6); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2 (argument waived where no relevant supporting authority cited).

Wyckoff v. Indus. Comm'n, 169 Ariz. 430, 434, 819 P.2d 1016, 1020 (App. 1991) (work-related scheduled prior injury is irrebuttably presumed to be disabling; scheduled injury unrelated to work is rebuttably presumed to be disabling). "The petitioner ha[s] the burden of proving not only the presence of a preexisting impairment, but also that the condition adversely affected his earning capacity at the time of the subsequent injury." *Lewis v. Indus. Comm'n*, 126 Ariz. 266, 269, 614 P.2d 347, 350 (App. 1980).

¶6 Here, the ALJ concluded, "Although [Cruz] suffered from a preexisting nonindustrial condition at the time of the industrial injury, the evidence presented does not establish that the applicant's earning capacity was adversely affected by her multiple sclerosis." The ALJ determined the knee injury was scheduled and awarded Cruz half of her average monthly wage for four months. A.R.S. § 23-1044(B)(15) and (21).

¶7 Cruz argues that the records of Dr. Horace Noland, her treating neurologist, show she had difficulty with MS before the industrial injury, and contends the various IME doctors did not consider the MS sufficiently.[3] She also argues, "If the employer is aware of a pre-existing condition and . . . that condition may wax and wane at any time . . . then [the] scheduled injury should be unscheduled to reflect that the combination of the injury and the pre-existing condition created a greater impairment that is unscheduled."

¶8 It is apparent from the record that in the years before her industrial injury, Cruz had MS symptoms, including leg pain and weakness. At the time of her last visit with Dr. Noland before

[3] TMC contends the records of Dr. Noland were not in evidence because TMC demanded cross-examination of Dr. Noland and the ALJ never issued the subpoena. The record does not support this contention. In TMC's cross-examination of Cruz, it relied extensively on Dr. Noland's records, and when asked by the ALJ if a particular note was in evidence, TMC's counsel answered, "It should be." TMC does not appear to argue the ALJ erred in failing to issue a subpoena to Dr. Noland.

the industrial injury, however, the doctor's notes stated, "She is steady on her feet . . . . Her reflexes are intact, if not a little brisk," and concluded, "She is doing fine," with regard to the MS. Further, Cruz's own testimony revealed that she had worked extra shifts of her job leading up to the incident and had not asked for special accommodations. Cruz did not provide wage information showing a decrease in earnings due to the MS before the industrial injury. On this record, there is no indication the MS adversely affected Cruz's wages at the time of the industrial accident.

¶9 Cruz relies on *Hoppin v. Industrial Commission*, 143 Ariz. 118, 692 P.2d 297 (App. 1984), for the proposition that because her MS was worsened as a result of the industrial injury, her knee injury became unscheduled. *Hoppin* is distinguishable. In *Hoppin*, the employee also suffered from MS. *Id.* at 119, 692 P.2d at 298. His physical disabilities, such as slurred speech, deteriorating handwriting and difficulty walking, affected his job performance, and the employer was concerned about the effect of the illness on the employee's work. *Id.* In classifying the industrial injury as unscheduled, the ALJ found that although the employee was receiving his regular paycheck at the time of the injury, the employer had intended to do something with the employee but waited because he had been a valued employee in the past. *Id.* at 122, 692 P.2d at 301. Here, there is no evidence that Cruz's work was similarly affected, or that TMC continued to pay her wages because of her longstanding service rather than her ability to perform her job functions. *Id.*

¶10 Cruz did not meet her burden of proving the MS had affected her earning capacity, which would have converted the industrial injury to an unscheduled injury. *See Lewis*, 126 Ariz. at 270, 614 P.2d at 351 (degenerative arthritis resulting in job change did not demonstrate loss of earning capacity without evidence of wages). The ALJ did not err in concluding that the knee injury was a scheduled disability.

Percentage of Average Monthly Wage

¶11 Cruz next contends that if her impairment is scheduled, she is entitled to seventy-five percent of her average monthly wage

because "evidence established she could not return to her prior employment," pursuant to A.R.S. § 23-1044(B)(21), which provides: "[I]f the employee is unable to return to the work the employee was performing at the time the employee was injured due to the total or partial loss of use, compensation pursuant to this section shall be calculated based on seventy-five per cent of the average monthly wage." She also notes that "it is unreasonable to find that, as a person engaged in work requiring her to be on her feet many hours a day, a pre-existing permanent physical disability such as her MS does not result in a disability from work."

¶12 When an industrial injury aggravates a preexisting condition such that the employee is disabled, the result is compensable. *See Tatman v. Provincial Homes*, 94 Ariz. 165, 169, 382 P.2d 573, 576 (1963); *see also Martinez v. Indus. Comm'n*, 192 Ariz. 176, ¶ 17, 962 P.2d 903, 907 (1998) ("industrial accident need not be the sole cause of an injury, so long as it is a cause"). When this occurs, however, the claimant must show "that the claimed permanent disability was in fact caused, 'triggered' or contributed to by industrial injury, and was not merely the result of the natural progression of the preexisting disease." *Arellano v. Indus. Comm'n*, 25 Ariz. App. 598, 604, 545 P.2d 446, 452 (1976).

¶13 Although Cruz contends she cannot return to work based on medical records indicating she was suffering from complications of MS, she presented no medical testimony or records to show that her MS flare-up after the industrial injury was causally related to her employment. *See Simpson v. Indus. Comm'n*, 189 Ariz. 340, 346, 942 P.2d 1172, 1178 (App. 1997) (claimant's burden to prove existence of industrially related permanent impairment). Rather, according to a physical therapist who completed a functional capacity evaluation but did not testify, Cruz admitted that she suffered decreased mobility after the industrial accident due to "lack of medication for MS since essentially last October," several months after the accident.

¶14 Additionally, the ALJ adopted the findings of independent medical examiner Dr. Raymond Schumacher as "the most probably correct and well-founded." Dr. Schumacher considered the MS to be separate from the knee injury, also noting

that the physical therapist was observing Cruz's total bodily function without trying to create a link between the MS and knee injury. Given the lack of testimony supporting a causal connection between the MS and the industrial injury, the ALJ did not err in disregarding the MS flare-up and concluding Cruz suffered only a partial permanent disability.

Consideration of Termination

¶15 Cruz finally argues that the ALJ ignored evidence that TMC improperly fired her for workers' compensation fraud after she was filmed in September 2011 working at a swap meet fruit stand during the period she was classified as disabled. She contends that the termination contributed to her industrial injury because it caused her to lose her health insurance and the ability to pay for MS medications, thereby aggravating her symptoms and decreasing her ability to work.[4]

¶16 First, Cruz cites no case law to support her argument that the ALJ erred in failing to consider the propriety of her

[4]Cruz also appears to argue that Dr. Schumacher's conclusions conflicted with the opinions of Dr. Noland and physical therapist Karen Lunda, and "lack[ed] sufficient foundation," and that therefore the ALJ erred in adopting his conclusions in support of the findings and award. Both arguments lack merit. Dr. Schumacher observed an examination of Cruz with an orthopedist, and a neurologist reviewed Dr. Noland's notes and Lunda's report before testifying, while Lunda and Dr. Noland did not testify nor assess any relationship between the MS and the industrial injury. When the ALJ has adopted one expert opinion over another, we will not disturb that finding unless it is "wholly unreasonable," *Gamez v. Indus. Comm'n*, 213 Ariz. 314, ¶ 15, 141 P.3d 794, 796 (App. 2006), and we do not do so here. Regarding the sufficient foundation argument, Cruz relies on *Desert Insulations, Inc. v. Industrial Commission*, 134 Ariz. 148, 654 P.2d 296 (App. 1982), in which a doctor relied on the employee's lie in making a diagnosis. Cruz does not point to any inaccuracies or incomplete facts on which Dr. Schumacher relied, therefore the argument fails.

termination by TMC. The argument is therefore waived. Ariz. R. Civ. App. P. 13(a)(6) (argument "shall contain the contentions of the appellant . . . with citations to the authorities, statutes, and parts of the record relied on"); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2 (argument waived where no relevant supporting authority cited). More important, whether Cruz's termination was proper or improper is not relevant to calculating the compensation for her industrial injury, particularly when Cruz never returned to work after the injury, and did not provide evidence that she tried to obtain work and failed. *Cf. Cohn v. Indus. Comm'n*, 178 Ariz. 395, 398-99, 874 P.2d 315, 318-19 (1994) (ALJ erred in denying testimony on propriety of termination where post-injury rehiring and termination used by employer to drive up post-injury earning capacity calculation).

¶17 Second, to the extent Cruz argues any exacerbation of her MS symptoms was related to the conduct of TMC, the argument nonetheless fails for the reasons stated above. Cruz appears to be arguing the ALJ had insufficient evidence to support its findings and award, but Cruz again cites no case law for the argument. Ariz. R. Civ. App. P. 13(a)(6) (argument "shall contain the contentions of the appellant . . . with citations to the authorities, statutes, and parts of the record relied on"); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2 (argument waived where no relevant supporting authority cited).

¶18 Finally, Cruz presented no medical evidence that any reported relapse or decrease in functional capacity was due to a lack of medication. Dr. Noland's notes only indicate that Cruz reported a relapse several months after the industrial injury, and physical therapist Karen Lunda's functional capacity evaluation stated Cruz was less functional at the examination than she had appeared in earlier surveillance videos, but did not relate that to lack of medication.[5] The ALJ adopted the opinions of Dr. Schumacher as the most probably correct and well founded, and Dr. Schumacher

[5] Lunda's notes state that Cruz related the decrease in functional capacity to lack of medication. Lunda did not make her own observation on that issue.

concluded that although the MS may wax and wane, her only MS symptom upon examination was fatigue, and he could not rate a disability of more than zero percent due to the MS. The ALJ did not err in failing to account for Cruz's termination or exacerbation of MS in making her findings and award.

Disposition

¶19 We affirm the ALJ's award and decision upon review.